

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : NO. CR – 240 - 2017  
:   
vs. :   
:   
JASON MATTHEW NOLTEE, :   
Defendant : CRIMINAL DIVISION

SUPPLEMENTAL OPINION IN SUPPORT OF ORDER OF  
JANUARY 26, 2018, IN COMPLIANCE WITH RULE 1925(A) OF  
THE RULES OF APPELLATE PROCEDURE

Following a non-jury trial on November 1, 2017, Defendant was convicted of two counts of driving under the influence of alcohol. On January 26, 2018, he was sentenced to 72 hours to six months incarceration.

Defendant filed a Notice of Appeal on February 8, 2018, and on February 21, 2018 this court directed Defendant to file a Statement of Matters Complained of on Appeal within twenty-one (21) days of that date. On April 3, 2018, no Statement of Matters having been filed, this court filed a 1925(A) Opinion recognizing the lack of a Statement, but allowing Defendant to thereafter file the Statement *Nunc Pro Tunc*. Defendant did file the Statement *Nunc Pro Tunc* on April 4, 2018 and the instant Supplemental Opinion is being issued to address the single matter raised therein.

Defendant contends the Commonwealth failed to present sufficient evidence to establish beyond a reasonable doubt that Defendant was guilty of the charges. Based on the arguments made at trial, the court will assume Defendant is contesting the sufficiency of the evidence that he was in “actual physical control” of the vehicle.<sup>1</sup>

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<sup>1</sup> At trial, Defendant did not contest the Commonwealth’s evidence that he was intoxicated; in fact, he emphasized his state of intoxication in his defense.

At trial, the Commonwealth presented the testimony of the arresting officer that on November 10, 2016, at about 2:14 a.m., he was on routine patrol and observed a vehicle in the parking lot adjacent to a local bar with its brake lights on. The officer testified that when he returned ten minutes later, the vehicle was still there, the brake lights were still on and three people were standing around the vehicle. According to the officer's testimony, he approached the vehicle and observed Defendant in the driver's seat with his foot on the brake. The keys were in the ignition, the ignition switch was turned to the "on" position and the radio was on. The engine was not running. When Defendant was unable to satisfactorily complete field sobriety tests he was arrested for driving under the influence of alcohol.<sup>2</sup>

Defendant argued at trial that his mere presence in the vehicle in a state of intoxication is not sufficient to establish that he was in actual physical control of the vehicle, citing Commonwealth v. Price, 610 A.2d 488, 490 (Pa. Super. 1992), wherein the Superior Court stated that "at a very minimum, a parked car should be started and running before a finding of actual physical control can be made." Defendant argues that since the vehicle in which he was found was not "started and running", the requisite finding cannot be made. The Court does not agree.

In spite of the Superior Court's statement in Price, determination of "actual physical control" of a vehicle continues to be based upon a totality of the circumstances. Commonwealth v. Saunders, 456 Pa. Super. 741, 691 A.2d 946 (1997). Here, those circumstances may not have included a running engine, but they did include the facts that the keys were in the ignition and in the "on" position, the radio was on and Defendant was seated in the driver's seat with his

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<sup>2</sup> The officer testified that the three people around the car were employees of the bar who had come out to check on Defendant.

foot on the brake pedal. The court believes those circumstances clearly established beyond a reasonable doubt that Defendant was preparing to operate the vehicle and was in actual physical control of such, thus sufficiently supporting the verdict in this case.

Dated: \_\_\_\_\_

Respectfully submitted,

Dudley N. Anderson, Senior Judge

cc: DA  
PD  
Gary Weber, Esq.